In the

Supreme Court of the United States

October Term, 1948

No. 216

ALGOMA PLYWOOD AND VENEER CO.,
Petitioner,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD,
Respondent.

Brief of Wisconsin Employment Relations Board

GROVER L. BROADFOOT,
Attorney General,

STEWART G. HONECK,
Deputy Attorney General,

BEATRICE LAMPERT,
Assistant Attorney General,

Attorneys for Wisconsin Employment Relations Board.

INDEX

CASES CITED

STATUTES INVOLVED

UNITED STATES STATUTES

TEXTS

In the

Supreme Court of the United States

October Term, 1948

No. 216

ALGOMA PLYWOOD AND VENEER CO.,

Petitioner,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD,

Respondent.

Brief of Wisconsin Employment Relations Board

The opinion of the Wisconsin Supreme Court of which review is sought is reported in 252 Wis. 549, 32 N. W. 2d. 417. The Wisconsin Supreme Court affirmed a judgment of the Circuit Court for Kewaunee County which is unofficially reported in 14 Labor Cases (C. C. H.) par. 64,253, sustaining and enforcing an order of the Wisconsin Employment Relations Board requiring the petitioner to cease and desist from encouraging membership in a specified labor organization by requiring as a condition of employment that employees become and remain members of such organization (R. 8-9).

STATEMENT RESPECTING GROUNDS ON WHICH JURISDICTION IS INVOKED

The petitioner seeks to invoke the jurisdiction of this court under sec. 237 (b) of the Judicial Code, 28 U. S. C. A. sec. 344 (b), on the ground that the validity of the order of the state board is drawn in question in that it is repugnant to sec. 8 (3), 49 Stat. 452, 29 U. S. C. A. §158 (3), and sec. 10 (a); 49 Stat. 453, 29 U. S. C. A. §160 (a) of the National Labor Relations Act (Wagner Act).

The order of the state board was entered prior to the effective date of the Labor-Management Relations Act, 1947, but the judgment of enforcement, by which it was given legal effect, was not entered until after that act became law. Since the order of the state board is continuing, we assume that the question of conflict with federal legislation is still present and is now based upon the provisions of the Labor-Management Relations Act, 1947, 61 Stat. 136-161, 29 U. S. C. A. Supp. secs. 141-197.

The petitioner argues the question only with relation to the National Labor Relations Act. If the issues are so limited we assume they are moot, because that act is no longer in existence; but since we believe the state's action to be valid under either law, we will cover both in our argument.

QUESTION PRESENTED

Is a state prevented by the National Labor Relations Act, or its successor, the Labor-Management Relations Act, 1947, from further restricting agreements requiring membership in a labor union as a condition of employment, when such agreements are made and performed in such state?

FACTS

The Algoma Plywood and Veneer Company (hereinafter referred to as the company or the employer) is a manufacturing concern operating within the state of Wisconsin and employing approximately 650 production workers (R. 38). In 1942, the Carpenters and Joiners of America, Local #1521 (hereinafter referred to as Local 1521) was designated by a majority of the company's employees in an election conducted by the National Labor Relations Board as their bargaining representative (R. 19). Since that time, the company and Local 1521 have entered into annual contracts covering wages, hours and working conditions (R. 19). A contract was executed between the company and Local 1521 in April 1946, to be effective for a term of one year, containing the following provision:

> "* * * All employees who, on the date of the signing of this agreement, are members of the Union in good standing in accordance with the constitution and by-laws of the Union, and those employees who may thereafter become members shall, during the life of the agreement as a condition of employment, remain members of the Union in good standing" (R. 39).

In January of 1947, the company discharged Victor Moreau pursuant to the foregoing provision, for failure to pay his dues in Local 1521 (R. 25, 29, 31).

Moreau filed an unfair practice charge against the employer before the Wisconsin Employment Relations Board (hereinafter referred to as the state board) (R. 12). After due hearing, the board found that the employer had encouraged membership in Local 1521, by discrimination in regard to tenure of employment, and directed the employer to cease and desist, unless the contract provision above quoted should be approved in a referendum conducted among the employees in accordance with the Wisconsin Statutes.

The bargaining unit covered by the contract in question includes production employees (R. 19), all of whom work wholly within the boundaries of Wisconsin. The testimony indicates that 95% of the company's business "deals in" interstate commerce, which presumably refers to the source of supplies and ultimate destination of products (R. 24).

SUMMARY OF ARGUMENT

I.

A. Congress has shown its intent, both expressly and by implication, to leave authority in states to further restrict contracts requiring union membership as a condition of employment. Such intent is shown expressly in the Labor-Management Relations Act, 1947, and impliedly in the National Labor Relations Act.

The National Labor Relations Board recognizes in its administration of federal regulation, that Congress preserved to states the question of what, if any, further restrictions are to be imposed with respect to contracts requiring union membership as a condition of employment.

B. Both the spirit and the wording of sec. 8 (3) of the National Labor Relations Act show that its purpose was not to authorize or to encourage contracts requiring membership in a labor organization as a condition of employment.

C. Sec. 10 (a) relates to procedure only, and was not intended to foreclose state action as to subject matter except where such action would stand as an obstacle to Congressional objectives.

General provisions affecting power and jurisdiction under federal legislation must be read so as to give effect to the specific provision preserving powers of states with respect to restriction of contracts requiring union membership as a condition of employment.

II.

The conduct of an election by the National Labor Relations Board to determine the employees' choice of a bargaining representative was not intended to confer power to enter a contract providing for compulsory unionism.

The authority of the bargaining representative emanates from the employees who are its principals, and not from a government agency. Its contracting powers are no greater than those of its principals.

The subject matter of contracts between employers and representatives of their employees are subject to the

usual rules of contract. The legality of such subject matter is determined by the law of the forum where the contract is made and performed.

ARGUMENT

I.

CONGRESS HAS LEFT TO STATES THE AUTHORITY TO IMPOSE FURTHER RESTRICTIONS UPON CONTRACTS PROVIDING FOR COMPULSORY UNIONISM

A. Congress has shown its intent affirmatively in sec. 14 (b) of the Labor-Management Relations Act, 1947

Sec. 14 (b) of Title I of the Labor-Management Relations Act, 1947, 61 Stat. 151, 29 U. S. C. A. Supp. §164 (b) provides:

> "Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

By the foregoing section, Congress intended to define the law as it had existed *previously* under the National Labor Relations Act and to incorporate it in the Labor-Management Relations Act, 1947. As pointed out in the confer-

ence report which was before Congress when the Labor-Management Relations Act, 1947, was adopted:*

> "Under the House bill there was included a new section 13 of the National Labor Relations Act to assure that *nothing in the act was to be construed as authorizing any* closed shop, union shop, maintenance of membership, or other *form of compulsory unionism* agreement in any State *where the execution of such agreement would be contrary to State law.* Many States have enacted laws or adopted constitutional provisions to make all forms of compulsory unionism in those States illegal. It was *never the intention of the National Labor Relations Act*, as is disclosed by the legislative history of that act, to preempt the field in this regard so as to deprive the States of their powers to prevent compulsory unionism. Neither the so-called 'closed shop' proviso in section 8 (3) of the existing act nor the union shop and maintenance of membership proviso in section 8 (a) (3) of the conference agreement could be said to authorize arrangements of this sort in States where such arrangements were *contrary to the State policy.* To make certain that there should be no question about this, section 13 was included in the House bill. The conference agreement, in section 14 (b), contains a provision having the same effect." (Emphasis supplied) (Leg. Hist. of the Labor-Manage-

*It has been suggested by the petitioner that there is no occasion for reference to committee reports to ascertain the intent of Congress because there is no obscurity in the language. It was our contention, too, that the language of the provisions invoked by the petitioner were unambiguous in showing that Congress left a field for state action; but if the contentions of the petitioner that it did not do so carry any weight, they create an ambiguity which warrant resort to committee reports. **Wright v. Vinton Branch of Mountain Trust Bank of Roanoke, Va.**, 300 U. S. 440, 81 L. ed. 786, 57 S. Ct. 556, 112 A. L. R. 1455; **Duplex Printing Press Co. v. Deering**, 254 U. S. 443, 65 L. ed. 349, 41 S. Ct. 172, 16 A. L. R. 196; **McLean v. U. S.**, 191 U. S. 88, 48 L. ed. 888, 33 S. Ct. 122; **Northern P. R. Co. v. Washington**, 222 U. S. 370, 380, 56 L. ed. 237, 240, 32 S. Ct. 160; **Occanic Steam Nav. Co. v. Stranahan**, 214 U. S. 320, 333, 53 L. ed. 1013, 1019, 29 S. Ct. 671; **Smith v. Payne**, 194 U. S. 104, 48 L. ed. 893, 24 S. Ct. 595.

ment Relations Act, 1947, Vol. 1, p. 564, published by N. L. R. B., U. S. Gov't. Printing Office, 1948; 80th Cong. House Conference Rept. No. 510 on H. R. 3020, p. 60.)

The National Labor Relations Board has recognized that Congress intended to remove "all federal restrictions upon existing and future state legislation prohibiting compulsory unionism insofar as the National Labor Relations Board is concerned, even where such legislation may affect employees engaged in interstate commerce." See *Giant Food Shopping Center, Inc.*, (1948) 77 NLRB #153, 22 LRRM 1070 in which the National Board said:

> "The issue before us on appeal, therefore, is the effect of Section 14 (b) upon the substantive union-shop provisions of the Act, that is, Sections 9 (e) (1) and (8) (a) (3). More specifically we are called upon to determine whether by reason of Section 14 (b) a unit is inappropriate for purposes of a union-shop election under Section 9 (e) (1) where such unit includes employees whose work is performed in a State which forbids union-shop agreements of the type sanctioned by Section 8 (a) (3).
>
> "The language of Section 14 (b) is amply clear, free from ambiguity, and emphatically proscriptive. Appearing as it does under that part of the Act entitled 'Limitations,' we believe that Section 14 (b) must be viewed as placing a limitation on all provisions of the Act, including Section 8 (a) (3) and 9 (e) (1), which in their unrestricted application might be construed as superseding or invalidating any State or Territorial law which prohibits membership in a labor organization as a condition of employment. Section 14 (b),

therefore, in effect removes all Federal restrictions upon existing and future State legislation prohibiting compulsory unionism insofar as the National Labor Relations Act is concerned, even where such legislation may affect employees engaged in interstate commerce. The power of the several States in certain circumstances to regulate the terms and conditions of employment is well recognized. (Bethlehem Steel Co., et al v. New York State Labor Relations Board, 330 U. S. 767, 772 [19 LRRM 2499].)

"The intent of Congress, consistent with this construction, is set forth with clarity in the legislative history preceding the enactment of Section 14 (b). Thus, the House Conference Report (H. Rep. No. 510, 80th Cong., 1st. Sess., p. 60) on the bill which became law states in part:

"'Under the House bill [H. R. 3020] there was included a new section 13 of the National Labor Relations Act to assure that nothing in the Act was to be construed as authorizing any closed shop, union shop, maintenance of membership, or other form of compulsory unionism agreement in any State where the execution of such agreement would be contrary to State law. * * * The conference agreement, in Section 14 (b), contains a provision having the same effect.

"The purpose of Section 13 of the House bill, adverted to above, was stated in the House Report accompanying H. R. 3020 as establishing the policy that *'the United States expressly declares the subject of compulsory unionism one that the States may regulate concurrently with the United States, notwithstanding that the State laws limit compulsory unionism more drastically than does the Federal law.'* (H. Rep. No. 245 on H. R. 3020, 80th Cong., 1st Sess., p. 34.) Thus, the legislative history preceding the enactment of Sec-

tion 14 (b) fully supports the otherwise clear language of this provision as establishing the intent of Congress to leave to the exclusive jurisdiction of the States the prohibition of union-shop agreements *to the extent that prohibition in this respect now exists or may hereafter exist in such States.* (That Section 14 (b) is applicable to future as well as existing State legislation is beyond the peradventure of a doubt. See H. Rep. No. 245 on H. R. 3020, 80th Cong., 1st Sess., p. 34, 93 Cong. Rec. 6456, 6520.)

"* * *

"We are convinced, therefore, that the conduct of union-shop elections pursuant to Section 9 (e) (1) in States which prohibit union-shop agreements would serve no useful purpose. To the contrary, it would lead only to the circumvention and frustration of State law, a result that Congress clearly did not intend as evidenced by its enactment of Section 14 (b). We conclude, therefore, that Section 14 (b) prohibits the utilization of Section 9 (e) (1) and the consequent application of the proviso of Section 8 (a) (3) by employers and unions who seek to evade the obligations imposed by State law prohibiting the execution or application of union-shop agreements." (Emphasis supplied)

The general counsel for the National Labor Relations Board has recognized that where state laws do not prohibit entirely union shop agreements but condition them more strictly than does the federal law, the stricter state law must be applied to contracts made and performed in such stat. See 12 LRR 262, and CCH-LLR par. 4530.12, p. 4753.4 which summarizes practice of the National Board as follows:

> "In a state the law of which makes the validity of a union security agreement dependent upon approval by a majority greater than that required under the amended NLRA, the Board will not certify a union shop authorization unless the greater majority required under state laws has been obtained."

Wisconsin is the first state with which the National Labor Relations Board has entered into an agreement pursuant to the Labor-Management Relations Act, 1947. The agreement provides that the National Board will conduct elections on the union shop to obviate the necessity of two elections. 22 LRR 268.

The foregoing actions by the national board demonstrate its administrative understanding that requirements such as contained in the Wisconsin Statutes (prohibiting union shop agreements unless they are validated by employee referendum in which two-thirds of the employees favor the agreement, as distinguished from the National Act which requires only a majority vote) are valid and do not conflict with federal legislation.

We do not suggest that the national board could change the purport of a Congressional enactment. Where, however, the administrative body charged with the enforcement of a federal law adopts a practical construction which is not in conflict with the provisions of the law, that construction will be given great weight and will not be rejected by the courts except upon extremely cogent considerations.*

---

*Innumerable cases have been cited to that effect by this court, but we will cite only two where the interpretation of laws by federal agencies was applied so as to permit states to regulate in fields where it was asserted that Congress had precluded such regulation. See, for instance, **Mintz v. Baldwin,** (1932) 289 U. S. 346, 351, 53 S. Ct. 611, 77 L. ed. 1245, in which it was held that the state was not precluded by federal legislation on the subject from preventing the import of cattle without certification that they were free of disease. In arriving at the

We believe the interpretation of law followed by the National Labor Relations Board and followed by the Wisconsin Supreme Court in the case now under examination correctly represents the Congressional intent; but a different result was reached in New Hampshire in *International Union of Teamsters v. Riley,* (1948) N. H. , 59 A. 2d 476. It was there held that although Congress left to states the power to *prohibit* compulsory unionism, it did not leave to states the power to regulate it in any other manner; and that accordingly state legislation which prohibits such contracts only under certain circumstances is invalid. The view taken by the National Labor Relations Board and the Wisconsin Supreme Court seems to us to be the better one for several reasons:

1. The state order under review falls within the literal scope of sec. 14 (b) of Title I of the Labor-Management Relations Act, 1947. It *prohibits* the execution and application of a contract provision requiring membership in a labor organization. The fact that such a contract might not be prohibited under other circumstances does not remove the prohibition of the state board which is under review from the literal application of sec. 14 (b).

---

decision that Congress did not intend to preclude such regulation by states, this court said:

"* * * Much weight is to be given to the practical interpretation of the Act by the Federal Department through its acquiescence in the enforcement of state measures to suppress Bang's disease. * * *"

See, also, **First Natl. Bank of Missouri,** (1923) 263 U. S. 640, 658, 44 S. Ct. 213, 68 L. ed. 486 holding that a state statute prohibiting branch banks was valid in application to a national bank, since it did not frustrate any purpose of the federal legislation. In reaching that result, this court took note of the fact that such interpretation of the federal legislation accorded with administrative interpretation by the Department of Justice and said:

"This interpretation of the statute by the legislative department and by the executive officers of the government would go far to remove doubt as to its meaning if any existed. * * *"

2. If sec. 14 (b) be deemed as nothing more than a Congressional authorization for states to *prohibit* compulsory unionism, that would still authorize state action *short* of complete prohibition. As stated in *Cantini v. Tillman*, (1893) 54 Fed. 969, 974, 975:

> "* * * Now, every greater includes the less. If the manufacture and sale can be entirely prohibited, they can be prohibited unless certain rules are complied with.
>
> "* * *
>
> "* * * Regulating a thing is the prohibition of it, except in accordance with certain rules * * *."

3. The view that sec. 14 (b) is a *delegation* of authority to states, and that it was intended to express a precise delimitation of state power, disregards the fact that it was included in the law merely as a verification of Congressional policy—to show that Congress had never intended to go any further into the traditional area of state regulation respecting legality of contracts than to impose a partial prohibition, and to leave it to individual state policy whether further limitations should be imposed.

If sec. 14 (b) be regarded, as it was intended to be, as a pronouncement of the limited extent to which Congress intended to occupy the field, the sole question is whether the particular state action involved is "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Of course a state could not legislate to authorize a contract prohibited by federal law.* Neither could a state prohibit something required by federal law. However nothing in the federal law requires the execution or application of a contract providing for com-

pulsory unionism under any circumstances, but rather it regulates in the opposite direction by restricting interference with free choice of employees under contracts which would be lawful, but for such legislation. Both the federal and state legislation with respect to compulsory unionism are restrictive, the only difference being that the state's is somewhat more restrictive. Two pieces of legislation are not inconsistent merely because one extends its restrictions further than that of the other.

That situation has been frequently discussed in connection with legislation by municipal corporations with respect to which it is said in 43 C. J. 219-220:

> "As a general rule, additional regulation to that of the state law does not constitute a conflict therewith. The fact that an ordinance enlarges upon the provisions of a statute by requiring more than the statute requires creates no conflict therewith, unless the statute limits the requirement for all cases to its own proscriptions."

The same principle is followed by the United States Supreme Court in determining whether there is a conflict between national and state regulation. The cases of *Savage v. Jones,* (1912) 225 U. S. 501, 32 S. Ct. 715, 725-726, 56 L. ed. 1182 and *Dickson v. Uhlmann Grain Co.,* (1932) 288 U. S. 188, 200, 53 S. Ct. 362, 365-366, 77 L. ed. 691, 83 A. L. R. 492 are exactly in point. It was held in both cases that restrictive legislation by Congress which expressly excepts certain situations from its restriction leaves states free to deal with the excepted subject matter. In the same manner as was done in the above cases, Congress has imposed a partial restriction, thus limiting the scope of its prohibitions and manifested its intent to occupy a limited field, leaving the unoccupied portion to states.

B. Section 8 (3) of the National Labor Relations Act did not prevent further restriction by states against compulsory unionism, even before Congress made a specific provision to that effect

Before Congress enacted an affirmative provision to establish that it never intended to extinguish the power of states to restrict compulsory unionism, attempts were sometimes made, as is done by the petitioner, to construe the excepting proviso of sec. 8 (3) of the National Labor Relations Act, 49 Stat. 452, 29 U. S. C. A. §158 (3) as if it *authorized* closed shop contracts (The same proviso is contained in the Labor-Management Relations Act, 1947, 61 Stat. 140, 29 U. S. C. A. Supp. §158 (3).

Such an interpretation would be contrary to both the spirit and the letter of the provision, which is aimed to restrict compulsory unionism rather than to encourage it. *Authorization* of closed shop contracts was unnecessary, because they are recognized as valid in the absence of legislation to the contrary.

Literally, the excepting proviso quoted at page 8 of the petitioner's brief simply removes from the restrictive purview of "*this* act" certain subject matter which would otherwise be within the proscription of the section. By excepting such contracts only from the prohibition of "*this act,*" and of other statutes "*of the United States,*" Congress showed that it did not intend to formulate a policy for states; or it would have added a phrase to that effect instead of limiting the exception by the quoted words.

There is a vast difference between simply *not prohibiting a certain course of conduct and authorizing such conduct.*

That Congress did not intend the proviso in §8 (3) of the National Labor Relations Act to preclude states from regulating or prohibiting contracts making union membership a condition of employment is made clear by the following excerpt quoted from the report of the Senate Committee on Education, upon the recommendation of which Congress adopted the provision in question:

> "* * * *In other words, the bill does nothing to facilitate closed-shop agreements or to make them legal in any State where they may be illegal;* it does not interfere with the *status quo* on this debatable subject but leaves the way open to such agreements as might now legally be consummated, with two exceptions about to be noted.
>
> "*The assertion that the bill favors the closed shop is particularly misleading in view of the fact that the proviso in two respects actually narrows the now existent laws regarding closed-shop agreements.* While today an employer may negotiate such an agreement even with a minority union, the bill provides that an employer shall be allowed to make a closed-shop contract only with a labor organization that represents the majority of employees in the appropriate collective bargaining unit covered by such agreement when made." (Emphasis supplied.) (Senate Report on Public Bills, 74th Cong., 1st Sess., Report #573)

As to the subject matter included in the excepting proviso Congress simply left the question in *status quo*, outside the scope of the Act. By so doing it implied "that in such matters federal policy is indifferent, and since it is indifferent as to what the individual may do of his own volition, we can only assume it to be equally indifferent to

what he may do under compulsion of the state." *Bethlehem Steel Co. v. New York State Labor Rel. Bd.*, (1947) 330 U. S. 767, 67 S. Ct. 1026, 91 L. ed. 1234.

The petitioner argues that if an employer refused to enter a demand for a closed shop contract contrary to a state law he would be found by the national board to have committed an unfair practice. In view of the policy of the national board of refusing even to conduct referenda in states where such contracts are forbidden by state law, such an assertion is manifestly without basis. The board decisions cited by the petitioner at p. 9 of its brief* do not involve such a situation. In those cases the employer refused to deal at all with the chosen agent of the employees, because he had no license under a state law which was later held invalid in *Hill v. State of Florida*, (1945) 325 U. S. 538, 65 S. Ct. 1373, 89 L. ed. 1782.

Refusing to deal at all with the chosen agent of the employees is not comparable to a refusal to agree to incorporate a specific provision in a contract because it is illegal.

In 2 Teller, *Labor Disputes and Collective Bargaining*, 879-880, §327, where it is said:

> "Bargaining in good faith under Section 8 (5) of the Act must be understood as negotiating within the framework of four main limits. The first is expressed in the rule that the Act does not compel the making of agreements. The Senate Committee on Education and Labor, in its report accompanying the National Labor Relations Bill, specifically stated that 'The committee wishes to dispel any possible false impression that this bill is designed to compel the making of agree-

*Eppinger & Russell Co., 56 N. L. R. B. 1259 and Tampa Electric Co., (1944) 56 N. L. R. B. 1270.

ments or to permit governmental supervision of their terms. It must be stressed that the duty to bargain collectively does not carry with it the duty to reach an agreement, because the essence of collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory.' The Board has stated in a number of cases that the Act is not intended, by virtue of anything contained in Section 8 (5) thereof *or any other section*, to compel the making of agreements.

"The second limit, which in one sense is probably a restatement of the first, is in other respects, and in the light of varying facts, an extension of the first. The Act does not compel an employer to meet the demands made by the union." (Emphasis added.)

The obligation to bargain imposed upon an employer requires him to discuss his position in good faith with respect to a demand for a union shop as with respect to any other demand. Nothing in the law, however, requires that he accede to such a demand; nor can any case be cited in which any employer has been found guilty of an unfair practice for refusing to agree to a provision for compulsory unionism which violates state law.

C. Section 10 (a) of the National Labor Relations Act did not preclude states from consistent regulation.

The petitioner argues that sec. 10 (a) of the National Labor Relations Act precludes states from any regulation of unfair practices of employers "in" interstate commerce.

That section provided that the national board is empowered to prevent any person from engaging in any unfair practice "(*listed in section* 158) *affecting commerce*," and it was *such power* that is made exclusive in the succeeding sentence. 49 Stat. 453, 29 U. S. C. A. §160 (a).

Since the power extends only to unfair practices "listed in section 158" and to practices "affecting commerce," practices which are not listed or those which have not been brought within the definition of the term "affecting commerce" by the method set up for making such determination are not within the scope of the provision. The term "affecting commerce" is defined to mean "in commerce or tending to lead to a labor dispute burdening or obstructing commerce."

The unfair practice involved in the instant case did not arise "in" commerce. The employees in the unit are all engaged in production. Nothing in the record indicates that any of them are involved in shipping or transportation. If the controversy falls within the scope of sec. 10 (a), it can do so only on the ground that it tends to lead to a dispute which would burden or obstruct commerce. The only agency which is authorized to make such a finding is the National Labor Relations Board.* Furthermore, the exclusive nature of the enforcement proceeding extends only to

*These contentions are discussed in greater detail in our brief in **International Union U. A. W. A. etc. v. W. E. R. B. et al.**, Nos. 14 and 15, copy of which will be supplied to the petitioner, and the argument will, therefore, not be duplicated here, because we deem that other issues are controlling.

such practices as are enumerated and sought to be prevented in that act. Where Congress delimited its regulation intentionally, as it has done with respect to compulsory unionism, it obviously intended the exclusive character of the preventive enforcement machinery to be comparably delimited.

This court specifically considered the grant of "exclusive" power by sec. 10 (a) in *Allen-Bradley Local* 1111 *v. Wisconsin E. R. Board*, (1942) 315 U. S. 740, 62 S. Ct. 820, 86 L. ed. 1154, and concluded that as to substantive questions on which Congress had not otherwise shown an intent to preclude states, the provision relating to the exclusive character of the enforcement machinery did not of itself accomplish that result.

In the face of that provision this court still recognized in *Bethlehem Steel Co. v. New York Labor Rel. Bd.*, (1947) 330 U. S. 767, 67 S. Ct. 1026, 91 L. ed. 1234, that Congress had "dealt with the subject but partially" and as to "closely related matters" which it left free of regulation, it implied that states might act.

The *Bethlehem case* involved facts in which the national board had not only taken jurisdiction of the question of appropriate bargaining units in the specific plants but had also laid down a general policy on the subject which the state endeavored to supersede. The case is not comparable to the one now before the court. Here there can be no possibility of conflict in a field preempted by Congress, because Congress has manifested its intent to leave room for state regulation. The words in the *Bethlehem Steel* case "are to be read in the light of the facts of

the case under discussion" because "expressions transposed to other facts are often misleading."*

II.

THE FACT THAT LOCAL 1521 WAS SELECTED AS A BARGAINING REPRESENTATIVE OF THE COMPANY'S EMPLOYEES IN AN ELECTION CONDUCTED BY THE NATIONAL BOARD DOES NOT PREVENT A STATE FROM ENFORCING ITS LAWS PROHIBITING CONTRACTS REQUIRING UNION MEMBERSHIP

It has been held in *Allen-Bradley Local* 1111 *v. Wisconsin E. R. Board,* (1942) 315 U. S. 740, 62 S. Ct. 820, 86 L. ed. 1154, and *Hill v. State of Florida,* (1945) 325 U. S. 538, 65 S. Ct. 1373, 89 L. ed. 1782, that a state law may not so deal with labor relations left subject to its control as to effect a forfeiture of bargaining rights or to stand as an obstacle to the accomplishment of the objectives of Congress. The petitioner argues that the state board's order effects a forfeiture of bargaining rights, as if the certification of a bargaining representative pursuant to an election conducted by the national board conferred upon the employer and the representative absolute power to contract as they please, without regard for state law.

We believe there is nothing in any fedefal legislation indicating that collective bargaining shall be on a different plane than any other type of contract negotiation, or that the parties are authorized to enter into contracts made ille-

---

*Armour & Co. v. Wantock, (1944) 323 U. S. 126, 132-133, 65 S. Ct. 165, 89 L. ed. 118.

gal by the law of the forum in which the contract is made and to be performed.

It was stated by the United States Supreme Court in *Amalgamated Utility Workers v. Consol. Edison Co.*, (1940) 309 U. S. 261, 263, 84 L. ed. 738, 60 S. Ct. 561, that the National Labor Relations Act does not create new rights but merely defined pre-existing ones. The right to bargain collectively which was so recognized was the usual right of contracting parties to negotiate through agents, subject to the applicable laws of the forum in which the contract was to be executed and performed.

Since the *National Labor Relations Act* created no new rights of contract, but merely set up machinery to prevent the infraction of pre-existing rights, it would seem to follow that state laws dealing with legality of the subject matter of contracts, which would have been valid prior to the enactment of the federal legislation, would not be invalid by reason of the mere enactment of such legislation.

The right of collective bargaining which is recognized by the National Labor Relations Act, relates to the *process* of bargaining rather than to the content of the agreement reached.

As stated in *Terminal R. Ass'n. v. Brotherhood of Trainmen*, (1943) 318 U. S. 1, 87 L. ed. 571, 63 S. Ct. 420, 423, the Supreme Court said:

> "The Railway Labor Act *like the National Labor Relations Act*, does not undertake governmental regulation of wages, hours, or working conditions. * * * The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions. The federal interest that is fostered is to see that disagreement about conditions does not reach the point

of interfering with interstate commerce.". (Emphasis added)

The certification of a bargaining representative by the National Labor Relations Board does not increase the rights which such a representative would have if its status had been determined in some other manner. The right to bargain collectively is universal, whereas the board's services to determine the bargaining agent are used in comparatively few cases. The certification does not of itself require anybody to do anything. As stated in *Southern S. S. Co. v. National Labor Relations Board*, (1941) 120 F. 2d 505, 506-507:

> "A certification proceeding is of a nonadversary, fact-finding character in which the Board plays the part of a disinterested investigator seeking merely to ascertain the desires of the employees as to their representation."

A certification does not clothe the certified representative with any of the attributes of a governmental agency, nor does it operate as a sanction of whatever agreement may be entered. Whatever authority the union has emanates *not from the National Labor Relations Board or from the federal act but rather from the employees* who appointed it as their agent.

Collective bargaining is a branch of the laws of contract and agency. The powers of the chosen agent do not exceed the powers of its principals. The power to contract, either directly or through an agent, has always been subject to the police power of the state in which the contract is made and to be performed. See *Restatement, Conflict of Laws*, secs. 347 and 360 which read in part:

"Sec. 347. The law of the place of contracting determines whether a promise is void or voidable for * * * illegality * * *."

"Sec. 360(1). If the performance of a contract is illegal by the law of the place of performance at the time for performance, there is no obligation to perform so long as the illegality continues."

Congress evinced no intent in the National Labor Relations Act or the Labor-Management Relations Act, 1947 to alter the settled state of affairs as to determining the legality or illegality of the *content* of a contract.

It is inconceivable that Congress intended, by encouraging the process of collective bargaining, to make the will of the bargainers superior to the police power of the state. Surely it would not be contended that an employer and the bargaining representative of his employees might contract so as to relieve the former of the obligation to maintain safety devices or sanitary equipment required by state law or to carry workmen's compensation insurance, or so as to authorize him to employ child labor. All of these matters are usual subjects of collective bargaining. With respect to a proposed contract involving a provision relating to child labor, which was prohibited by state law, it was stated in *Globe Cotton Mills v. N. L. R. B.*, 103 F. 2d 91, 94, that the National Labor Relations Act does not contemplate bargaining about legislative policies.

It is as logical to argue that the powers of the contracting parties are superior to the police power in respect to the foregoing matters as to argue that the state may not limit the right to contract so as to protect the freedom of choice of individual workers from being extinguished by the combined power of the employer and labor unions.

CONCLUSION.

The field of compulsory unionism is one in which Congress has manifested its intent both expressly and impliedly that its regulation may be supplemented by that of the states. This court has said that Congress may exercise its authority "alone or in conjunction with coordinated action by the states."* No federal agency has challenged the state's action. Indeed, federal and state administrative agencies cooperate in carrying out the Congressional policy of an amicable, co-ordinated program. The state board's order under attack is a valid regulation under this program.

Respectfully submitted,

GROVER L. BROADFOOT,
Attorney General,

STEWART G. HONECK,
Deputy Attorney General,

BEATRICE LAMPERT,
Assistant Attorney General,

Attorneys for Wisconsin Employment Relations Board.

---

*Prudential Ins. Co. v. Benjamin, 1945, 328 U. S. 408, 66 S. Ct. 1142, 90 L. ed. 1342.

APPENDIX

WISCONSIN STATUTES PRIMARILY INVOLVED

Sec. 111.06 (1) (c) provides in part:

"(1) It shall be an unfair labor practice for an employer individually or in concert with others:

"* * *

"(c) 1. To encourage or discourage membership in any labor organization, employe agency, committee, association or representation plan by discrimination in regard to hiring, tenure or other terms or conditions of employment; provided, that an employer shall not be prohibited from entering into an all-union agreement with the representatives of his employes in a collective bargaining unit, where at least two-thirds of such employes voting (provided such two-thirds of the employes also constitute at least a majority of the employes in such collective bargaining unit) shall have voted affirmatively by secret ballot in favor of such all-union agreement in a referendum conducted by the board. * * *"

Sec. 111.02 (9) provides:

"(9) The term 'all-union agreement' shall mean an agreement between an employer and the representative of his employes in a collective bargaining unit whereby all or any of the employes in such unit are required to be members of a single labor organization."